STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU
LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747
Fax No.: (775) 684-6600

LORNE J. MALKIEWICH, *Director*
(775) 684-6800

LEGISLATIVE COMMISSION (775) 684-6800
RANDOLPH J. TOWNSEND, *Senator, Chairman*
Lorne J. Malkiewich, *Director, Secretary*

INTERIM FINANCE COMMITTEE (775) 684-6821
MORSE ARBERRY JR., *Assemblyman, Chairman*
Mark W. Stevens, *Fiscal Analyst*
Gary L. Ghiggeri, *Fiscal Analyst*

BRENDA J. ERDOES, *Legislative Counsel* (775) 684-6830
PAUL V. TOWNSEND, *Legislative Auditor* (775) 684-6815
DONALD O. WILLIAMS, *Research Director* (775) 684-6825

October 9, 2007

Assemblyman Marcus Conklin
1600 Palmae Wy.
Las Vegas, NV 89128-3244

Dear Assemblyman Conklin:

You have asked this office several questions concerning Assembly Bill No. 440 of the 74th Legislative Session (A.B. 440). We will discuss each of your questions in turn.

I. Meaning of "commercially reasonable"

You have asked us to discuss the meaning of the phrase "commercially reasonable," as used in paragraph (b) of subsection 1 of NRS 598D.100, as amended by section 2 of A.B. 440. Before the enactment of A.B. 440, it was an unfair lending practice under Nevada law for a lender to make a home loan without determining that the borrower was able to repay the home loan. NRS 598D.100 was amended by section 2 of A.B. 440 to read, in pertinent part, as follows:

> 1. It is an unfair lending practice for a lender to:
>
> (a) Require a borrower, as a condition of obtaining or maintaining a home loan secured by home property, to provide property insurance on improvements to home property in an amount that exceeds the reasonable replacement value of the improvements.
>
> (b) Knowingly or intentionally make a home loan ***, other than a reverse mortgage,*** to a borrower ~~[based]~~ ***, including, without limitation, a low-document home loan, no-document home loan or stated-document home loan*** ~~[solely upon the equity of the borrower in the home property and without]~~ ***, without*** determining ***, using any commercially reasonable means or mechanism,*** that the borrower has the ability to repay the home loan. ~~[from other assets, including, without limitation, income.]~~

(c) Finance a prepayment fee or penalty in connection with the refinancing by the original borrower of a home loan owned by the lender or an affiliate of the lender.

(d) Finance, directly or indirectly in connection with a home loan, any credit insurance.

* * *

(Emphasis added.) Thus, section 2 of A.B. 440 delineated a standard for the means or mechanisms by which a lender must determine the borrower's ability to repay a home loan, other than a reverse mortgage. By providing that the determination must be performed "using any commercially reasonable means or mechanisms," the Legislature was able to strike a balance that would ensure that the borrower's ability to repay the loan was investigated but without making the investigation component so expensive or onerous as to make the cost of making the loan unreasonable or not commercially viable.

In the context of ensuring that the means or mechanisms required to confirm the borrower's ability to repay the loan are commercially reasonable so that the cost of providing the safeguard does not outweigh the potential benefits, it is clear that the Legislature intended that the phrase "commercially reasonable" be interpreted so as to tie the "means or mechanisms" modified by the phrase "commercially reasonable" to sound and widely used commercial practices. Through the years a body of case law has developed which clearly indicates that the Legislature should not provide a definition for a term or phrase used in a law if the term or phrase is intended to have its common or ordinary meaning. Additionally, courts have widely held that "words in a statute should be given their plain meaning unless this violates the spirit of the act." McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986). Thus, "[w]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." City Council v. Reno Newspapers, Inc., 105 Nev. 886, 891 (1989). To arrive at the ordinary meaning of statutory language, a reviewing court usually relies upon dictionary definitions because those definitions reflect the plain and ordinary meanings that are commonly ascribed to words and terms. *See* 2A Sutherland Statutory Construction § 46.02 (5th ed. 1992); Cunningham v. State, 109 Nev. 569, 571 (1993). Black's Law Dictionary defines "commercially reasonable" as "conducted in good faith and in accordance with commonly accepted commercial practice." Black's Law Dictionary 263 (7th ed. 1999). Accordingly, it is the opinion of this office that for the purposes of paragraph (b) of subsection 1 of NRS 598D.100, as amended by section 2 of A.B. 440, a lender will be acting in a "commercially reasonable" manner in determining the ability of a borrower to repay a home loan, other than a reverse mortgage, if the lender acts in good faith and engages in a practice widely accepted in the home loan industry to make that determination.

This interpretation of the phrase "commercially reasonable" is also supported by the legislative history of A.B. 440. The phrase was added as part of Amendment No.

1064 to A.B. 440 by the Senate Committee on Commerce and Labor. During the May 29, 2007, hearing on A.B. 440 before the Senate Committee on Commerce and Labor, the meaning of the phrase "commercially reasonable" was discussed as follows:

> ASSEMBLYMAN MARCUS CONKLIN (Assembly District No. 37):
> . . . . I do have a concern about the amendment to section 2, subsection 1, paragraph (b). The use of the word "commercially" seems to exclude personal assets from this process. Maybe I am misreading this or giving it too literal of an interpretation; I just want to make sure it is clear.
>
> CHAIR TOWNSEND:
> The intent of the Committee was that the phrase "commercially reasonable means or mechanism" would allow individuals to use both assets and income streams as a means of securing a loan.
>
> WILLIAM R. UFFELMAN (Nevada Bankers Association):
> The term "commercially reasonable means or mechanism" is accepted practice in the industry. It includes both assets and income.
>
> CHAIR TOWNSEND:
> We will make sure that when the bill gets to the Senate Floor, we put that intention in the record.

Minutes of the Senate Committee on Commerce and Labor, May 29, 2007, at p. 3. The testimony of Senator Randolph J. Townsend and witness William R. Uffelman both indicate that the term "commercially reasonable means or mechanism" refers to "accepted practice in the industry," which includes considering the assets and income of a borrower.

In summary, based on plain meaning and the legislative history of A.B. 440, it is the opinion of this office that a lender would not be found to have committed an unfair lending practice under paragraph (b) of subsection 1 of NRS 598D.100, as amended by A.B. 440, if the lender makes a home loan, other than a reverse mortgage, in good faith and uses a "means or mechanism" that is commonly accepted in the home loan industry to determine the borrower's ability to repay the home loan, which includes considering the assets and income of the borrower.

II. Effect of opinions or other guidance provided by the Division of Mortgage Lending of the Department of Business and Industry

You have also asked whether a person or entity to which the provisions of paragraph (b) of subsection 1 of NRS 598D.100, as amended by A.B. 440, may apply,

could safely rely upon the opinions or other guidance provided by the Division of Mortgage Lending of the Department of Business and Industry in determining how best to comply with those provisions.

The Division of Mortgage Lending of the Department of Business and Industry has the authority to regulate mortgage lending in general as well as its related professions. NRS 645F.250. Pursuant to this authority, the Division may impose disciplinary action against mortgage bankers, brokers or agents for not conducting their business "in accordance with [the] law" or engaging in "conduct constituting a deceitful, fraudulent or dishonest business practice." NRS 645E.670(2)(c) and (p). Therefore, any opinion or other guidance issued by the Division in regards to paragraph (b) of subsection 1 of the amended NRS 598D.100, as amended by A.B. 440, would obviously indicate the interpretation of that paragraph by the Division. As a practical matter, any party subject to the authority the Division would obviously be prudent in following such an opinion or guidance. If a party did follow such opinions or guidance and then was later subject to disciplinary action by the Division, the party may raise the doctrine of equitable estoppel as a result of its reliance on the opinions or guidance to obtain relief from the disciplinary action. See, e.g., Nevada Public Employees Retirement Board v. Byrne, 96 Nev. 276 (1980), Southern Nevada Memorial Hospital v. State Department of Human Resources, 101 Nev. 387 (1985).

Additionally, we have reviewed the information currently contained on the website of the Department of Business and Industry which includes a letter to Mortgage Banker Licensees and Mortgage Broker Licensees dated September 13, 2007. The advice in that letter as to the meaning of the term "commercially reasonable means or mechanism" and the related guidelines for licensees appear to be consistent with the opinions expressed in this letter.

III. Effect on secondary mortgage lenders

You have asked us to discuss the effect of paragraph (b) of subsection 1 of NRS 598D.100, as amended by A.B. 440, on secondary mortgage lenders. For purposes of this discussion, we understand that a secondary mortgage lender is a lender that purchases a mortgage from another lender and therefore did not make the initial home loan.

Paragraph (b) of subsection 1 of NRS 598D.100, as amended by A.B. 440, makes it an unfair lending practice for a lender to "[k]nowingly or intentionally make" certain home loans in certain circumstances. Because "make" is not specifically defined, we may, in accordance with the previously described rules of statutory construction, rely on its dictionary definition to determine the plain meaning of the relevant statutory language. See Cunningham v. State, 109 Nev. 569, 571 (1993). Black's Law Dictionary defines "make" as "to legally perform, as by executing, signing, or delivering (a document); to make a contract." Black's Law Dictionary 967 (7th ed. 1999). Applying this definition

to paragraph (b) of subsection 1 of NRS 598D.100, as amended by A.B. 440, it appears that the provision would only apply to those lenders who "legally perform, as by executing, signing, or delivering" a home loan. Because a secondary mortgage lender does not itself "legally perform, as by executing, signing, or delivering" a home loan but instead purchases a home loan that has already been legally performed, it is the opinion of this office that paragraph (b) of subsection 1 of NRS 598D.100, as amended by A.B. 440, does not apply to secondary mortgage lenders. Additionally, we see nothing in the law that would indicate that the Legislature intended for secondary mortgage lenders to recheck or in any way be responsible for ensuring that the initial lender who made the loan, used appropriate means or mechanisms to confirm the borrower's ability to repay the loan.

IV. Effect on home loans insured by the Federal Housing Administration of the U.S. Department of Housing and Urban Development or by the U.S. Department of Veterans Affairs

You have asked us to discuss the effect of paragraph (b) of subsection 1 of the NRS 598D.100, as amended by A.B. 440, on home loans insured by the Federal Housing Administration of the U.S. Department of Housing and Urban Development or by the U.S. Department of Veterans Affairs. The Federal Housing Administration has the authority to insure various types of home loans within certain parameters. 12 U.S.C. § 1709, et al. The Department of Veterans Affairs is authorized to insure various types of home loans for certain veterans. 38 U.S.C. § 3703, et al. Before extending insurance for home loans pursuant to their respective authority, the FHA and the VA examine the financial status and repayment ability of the borrower. 12 U.S.C. § 1709(b)(4); 38 USC § 3710(b)(2) and (3).

As discussed previously, it would not constitute an unfair lending practice under paragraph (b) of subsection 1 of NRS 598D.100, as amended by A.B. 440, if, in making a home loan, other than a reverse mortgage, a lender acts in good faith and uses a means or mechanism that is commonly accepted in the home loan industry to determine a borrower's ability to repay a home loan. Since the FHA and VA are required by federal law to examine the financial status and repayment ability of each borrower and many FHA and VA loans are made each year, it appears that relying upon the fact that the FHA or VA has agreed to insure a loan to determine the borrower's ability to repay the loan may be a practice widely accepted in the home loan industry. Therefore, if it is commonly accepted in the home loan industry for a lender to rely upon the grant of FHA or VA insurance as an indication that a borrower has the ability to repay a home loan, and the lender does so and acts in good faith, it is the opinion of this office that the lender would not be found to have committed an unfair lending practice under paragraph (b) of subsection 2 of NRS 598D.100, as amended by A.B. 440.

V. Applicability to home loans pending on October 1, 2007

Finally, you have asked us to discuss the effect of paragraph (b) of subsection 1 of NRS 598D.100, as amended by A.B. 440, on loans pending on the effective date of A.B. 440. A.B. 440 became effective on October 1, 2007. *See* NRS 218.530. Because A.B. 440 did not contain any provisions addressing the applicability of the bill to loans that were pending on October 1, 2007, we must examine the relevant language in A.B. 440. Paragraph (b) of subsection 1 of NRS 598D.100, as amended by A.B. 440 states that it is an unfair lending practice for a lender to "make a home loan" under certain circumstances. (Emphasis added.) Pursuant to the rules of statutory construction, the plain meaning of "make" is "to legally perform, as by executing, signing, or delivering (a document); to make a contract." Black's Law Dictionary 967 (7th ed. 1999); *see* Cunningham v. State, 109 Nev. 569, 571 (1993). Therefore, it is the opinion of this office that the provisions of A.B. 440 would apply to each loan that has not been legally executed by October 1, 2007.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By _____
Andrew Min
Deputy Legislative Counsel

By _____
Eileen O'Grady
Chief Deputy Legislative Counsel

AM:dtm
Ref No. 0709041758
File No. OP_Conklin070919145425